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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VALER V. SECAREA, JR.,	
Plaintiff and Appellant,	G037651
v.	(Super. Ct. No. 05CC10019)
REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from judgments of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed in part, Reversed in part.

Valer V. Secarea, Jr., in pro. per., for Plaintiff and Appellant.

Taylor Blessey and Barbara M. Reardon for Defendant and Respondent Charles Swerdlow, M.D.

Carroll, Kelly, Trotter, Franzen & McKenna, Mark V. Franzen, Dmitriy Cherepinskiy and David P. Pruett for Defendant and Respondent Irvine Regional Hospital and Medical Center.

Maranga & Morgenstern, John F. Peterson; Greines, Martin, Stein & Richland, Martin Stein and Cynthia E. Tobisman for Defendants and Respondents Regents of the University of California, Kalyanam Shivkumar, M.D., and David Cesario, M.D.

Plaintiff Valer V. Secarea, Jr.'s, wife, Nadine, died from a rare complication associated with a catheter ablation procedure to mitigate her irregular heartbeat. Plaintiff sued defendants the Regents of the University of California (the Regents), Kalyanam Shivkumar, M.D., David Cesario, M.D., and Charles Swerdlow, M.D.[1] for medical malpractice and wrongful death, and other causes of action. Plaintiff alleges the doctors failed to inform Nadine of the risk of death from the particular surgical complication which took her life; performed a different procedure from the one explained to Nadine and to which she had consented; allowed, without her consent, an understudy to perform the actual procedure; engaged in unauthorized medical experimentation; and failed to disclose their research interest in performing the procedure. Plaintiff also sued Irvine Regional Hospital and Medical Center (Irvine Regional), alleging it failed to properly assess and document Nadine's condition after she arrived at their emergency facility manifesting symptoms of the surgical complication.

Plaintiff contends the trial court erred when it sustained demurrers to several of plaintiff's causes of action without leave to amend, and granted defendants' motions for summary judgment as to plaintiff's remaining claims.

We conclude the trial court erred in granting summary judgment for Irvine Regional. In its motion, Irvine Regional sought to demonstrate plaintiff could not prove its nurses acted negligently, or that the nurses caused or contributed to Nadine's death. Plaintiff, however, raised a triable issue of fact on whether the nurses followed the standard of care in treating Nadine, and Irvine Regional failed to negate plaintiff's claim the nurses' negligence caused or contributed to Nadine's death.

We also conclude the trial court erred in granting summary judgment for the UCLA defendants. Although the trial court properly granted summary adjudication on plaintiff's wrongful death claim, the trial court erred in summarily adjudicating

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[1] For convenience, we will sometimes refer to the Regents, Shivkumar, Cesario, and Swerdlow as the UCLA defendants.

plaintiff's informed consent claim because the UCLA defendants' evidence failed to establish that no reasonable patient would have refused the ablation procedure had the doctors fully disclosed the risk of the particular complication that took Nadine's life. Accordingly, we reverse summary judgment in favor of Irvine Regional and the UCLA defendants, and affirm the orders granting summary adjudication in favor of the UCLA defendants on the first cause of action, and sustaining without leave to amend the demurrers of Shivkumar, Cesario, and UCLA to the fourth through 10th causes of action, and the demurrers of Swerdlow to the third through 10th causes of action.

I

FACTUAL AND PROCEDURAL BACKGROUND

The decedent, Nadine Secarea, suffered from cardiac arrhythmia, or irregular heartbeat. After three years of "annual hospitalizations" from the effects of arrhythmia, Nadine consulted cardiologist and electrophysiologist, Dr. Charles Swerdlow, to discuss the possibility of treating her condition with a cardiac catheter ablation. This procedure involves inserting a catheter, or wire, into a blood vessel and winding the catheter into the heart. Electrodes on the tip of the catheter measure the heart's electrical activity and determine the location of the "short circuit" that interrupts the heart's normal rhythms. Once doctors identify the area of the abnormal electrical activity, energy is applied to destroy a small amount of heart tissue. This results in the formation of lesions that halt the abnormal electrical disturbances from that area and restore the heart's natural rhythm.

Swerdlow and Shivkumar, who often worked as a team, arranged to perform Nadine's catheter ablation procedure at UCLA Medical Center. The evening before the procedure, Shivkumar met with Nadine and her husband to explain the procedure. Nadine reviewed and executed various informed consent forms during the meeting. On August 11, 2004, Swerdlow performed the ablation procedure, assisted by

Cesario. At that time, Cesario was an electrophysiology fellow who had graduated from medical school eight years earlier, and had completed an internship and cardiology residency. The doctors completed the ablation procedure with no apparent complications, and Nadine went home the following day with instructions to follow up with Swerdlow in one month.

While at home on September 6, 2004, Nadine began experiencing visual disturbances along with tingling and numbness in her hands and arms. Plaintiff called 911, and an ambulance transported Nadine to Irvine Regional's emergency room. Doctors concluded she had suffered a transient ischemic attack, sometimes referred to as a mini-stroke, and transferred her to a telemetry unit for continuous electronic monitoring. On September 7, Nadine suffered a drop in blood pressure and a decrease in her level of consciousness. The following day, doctors determined Nadine had suffered a stroke affecting 80 to 90 percent of her cognitive abilities and probably would not regain consciousness. On September 12, Nadine's brain wave pattern showed she had suffered brain death, and plaintiff consented to her removal from life support. Nadine died shortly thereafter. An autopsy revealed Nadine had died from the effects of an atrio-esophageal fistula, a rare, but usually fatal, complication of the cardiac catheter ablation procedure.

Plaintiff sued defendants, alleging: (a) Nadine's doctors failed to advise her of the potential for the atrio-esophageal fistula complication; (b) Nadine consented to a limited empirical pulmonary vein isolation (LEPVI) procedure, which would have minimized the number of burns, but the doctors performed an unauthorized wide area circumferential or "Pappone Technique" procedure instead; (c) Nadine conditioned her consent upon Swerdlow and Shivkumar performing the surgery as a team, but Shivkumar left the operating room shortly after Nadine was placed under anesthesia; (d) Nadine conditioned her consent on only Swerdlow and Shivkumar performing the operation, but Swerdlow allowed Cesario, an "understudy," to perform the procedure as part of his "on the job training"; (e) the doctors employed an esophageal stethoscope — a temperature

probe designed to assist anesthesiologists — to protect against the atrio-esophageal fistula complication; use of the probe for this purpose was experimental, which (i) required FDA approval, (ii) violated the Regents' own policies and procedures, and (iii) was done without Nadine's consent; (f) Swerdlow, Shivkumar, and Cesario failed to disclose to Nadine their research interest in using the esophageal stethoscope to prevent the atrio-esophageal complication; and (g) following Nadine's arrival at the emergency room, Irvine Regional "failed to assemble the information and data needed to correctly diagnose and treat NADINE's critical condition."

Plaintiff's second amended complaint set forth the following claims: First cause of action, wrongful death against all defendants; second cause of action, survival action for lack of informed consent against Swerdlow, Shivkumar, Cesario, and UCLA; third cause of action, survival action for lack of informed consent — patient abandonment, against Swerdlow and Shivkumar; fourth cause of action, survival action for battery — ghost surgery against Swerdlow, Cesario, Shivkumar, and UCLA; fifth cause of action, survival action for battery — covert medical experimentations against Swerdlow, Shivkumar, Cesario, and UCLA; sixth cause of action, survival and individual action for fraud — "ghost surgery" against Swerdlow, Shivkumar, Cesario, and UCLA; seventh cause of action, survival and individual action for fraud — medical experimentation against Swerdlow, Shivkumar, and UCLA; eighth cause of action, survival action for negligence per se against Swerdlow, Shivkumar, Cesario, UCLA, and Vital Signs, Inc. (Vital Signs)[2]; ninth cause of action, product liability — negligence against Vital Signs, Swerdlow, Shivkumar, and UCLA; 10th cause of action, survival action for strict products liability — against Vital Signs, Swerdlow, Shivkumar, and UCLA; 11th cause of action, survival action based on Code of Civil Procedure section 377.20 against all defendants.

[2] Plaintiff alleges Vital Signs manufactured the esophageal stethoscope used to monitor temperatures in Nadine's esophagus during the ablation procedure.

The trial court sustained without leave to amend the demurrers of Shivkumar, Cesario, and UCLA to the fourth through 10th causes of action, and the demurrers of Swerdlow to the third through 10th causes of action. All of the defendants filed summary judgment motions, which the trial court granted. Plaintiff now appeals from the resulting judgment.

II

DISCUSSION

A. *The Trial Court Erred in Granting Summary Judgment for Irvine Regional*

Plaintiffs sued Irvine Regional for wrongful death (first cause of action)[3] and survival of claims under Code of Civil Procedure section 377.20 (11th cause of action).[4] The complaint alleges Irvine Regional "failed to assemble the information and data needed to correctly diagnose and treat NADINE's critical condition."

In support of its summary judgment motion, Irvine Regional submitted the declaration of registered nurse Ellen Daroszewski, an expert with a PhD in nursing. In her declaration, Daroszewski reviewed in detail the activities of the Irvine Regional nurses during Nadine's stay at the hospital, and opined their actions fell within the applicable standard of care. She also concluded the nursing services Irvine Regional rendered to Nadine did not cause or contribute to her death.

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[3] To prove a wrongful death claim, plaintiff must establish: "(1) a 'wrongful act or neglect' on the part of one or more persons that (2) 'cause[s]' (3) the 'death of [another] person' [citation] . . . ." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 390.)

[4] Code of Civil Procedure section 377.20, subdivision (a), provides, in relevant part: "Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period."

In opposition, plaintiff submitted the declaration of Christine Farrell, a registered nurse and associate clinical professor at University of California, Los Angeles. Farrell provided a detailed explanation of situations where the actions of the Irvine Regional's nurses fell significantly below the standard of care for emergency room nurses, citing, for example, instances where the nurses failed to promptly perform a specific neurological assessment, failed to monitor heart rhythms, and failed to note the patient had vomited blood upon her arrival to the emergency room. Farrell concluded that the substandard care provided by Irvine Regional nurses and their lack of communication with the emergency room physicians contributed to Nadine's death.

The trial court observed that Farrell's declaration may have raised a triable issue of fact on whether the nurses met the applicable standard of care, but concluded the declaration failed to raise a triable issue of fact on causation. Specifically, the court noted Farrell "fails to identify how the 'substandard' nursing care, or how the lack of communication with the emergency room physician more likely than not causes decedent's death. The fact that a breach in standard of care may have occurred does not automatically result in the cause of death in this case."

Plaintiff contends the trial court erred in granting summary judgment because Irvine Regional's motion did not address the hospital's vicarious liability for the emergency room physicians' alleged malpractice, and Irvine Regional failed to make a prima facie showing that the nurses' actions did not contribute to Nadine's death.

To support his first contention, plaintiff argues the hospital is liable for the acts of the emergency room physicians under theories of ostensible agency, breach of fiduciary duty, and elder and dependent adult abuse. The problem for the plaintiff on these theories is twofold. First, plaintiff fails to allege any of these theories in the second amended complaint. Second, plaintiff failed to raise the issue of Irvine Regional's vicarious liability for the actions of the emergency room doctors in the court below. Plaintiff opposed Irvine Regional's summary judgment motion solely by addressing the

actions of the hospital's nurses, but did not claim Irvine Regional failed to negate vicarious liability for its physicians' alleged malpractice.

"The appellate court can deem an argument raised in an appeal from a grant of summary judgment waived if it was not raised below and requires consideration of new factual questions." (*Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488.) The alleged malpractice of the emergency room physicians indisputably raises factual questions not addressed in plaintiff's separate statement or evidence. We therefore deem the argument waived.

We agree, however, with plaintiff's contention that Irvine Regional failed to meet its burden of production on causation. On a motion for summary judgment, the moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the moving party shows "'"that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." [Citations.]' [Citation.]" (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 35-36.)

To meet its burden of production, Irvine Regional relies on Daroszewski's declaration which cites all of the appropriate measures taken by the nurses, and concludes the nurses did not commit a negligent act or omission that caused or contributed to Nadine's death. But Daroszewski fails to acknowledge or address any of the allegedly negligent acts and omissions cited in Farrell's declaration, and provides no opinion on whether such acts, if proven, could have contributed to Nadine's death. For example,

Daroszewski does not explain how the nurses' alleged failure to perform a neurological assessment, monitor heart rhythms, or report that the patient had vomited blood upon her arrival to the emergency room could not have contributed to her death.

True, in performing her review of the medical records, Daroszewski might have considered the shortcomings Farrell identified, and determined none was serious enough to mention. But "an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (*Bushling*).) By failing to expressly acknowledge the factual bases for plaintiff's liability claim, the Daroszewski declaration lacks "a reasoned explanation of why the underlying facts lead to the ultimate conclusion" that the nurses' actions did not cause or contribute to Nadine's death.

We recognize Daroszewski's declaration could not directly address Farrell's declaration, given that Irvine Regional necessarily filed Daroszewski's declaration first. But it was incumbent on Irvine Regional to learn the specific factual basis for plaintiffs' wrongful death claim, whether through demurrer or discovery, before moving for summary judgment. Had it done so, Irvine Regional could have met its burden of production on the issue of causation by having an appropriate medical expert specifically explain why, even if plaintiff proved his allegations concerning the nurses, their actions could not have caused or contributed to Nadine's death. Irvine Regional did not do so, and we therefore conclude the trial court erred in granting Irvine Regional's summary judgment.

B. *The Trial Court Did Not Err in Granting Summary Adjudication on Plaintiff's First Cause of Action for Wrongful Death Against the UCLA Defendants*

In the second amended complaint, plaintiff's first cause of action alleges that "defendants, and each of them, so negligently, carelessly, recklessly, wantonly, and without consent, treated, experimented upon, misrepresented, provided such deficient care, monitoring, examination, diagnosis and other medical services so as to directly and proximately cause death to NADINE."

In support of their summary judgment motion, the UCLA defendants submitted the declaration of Andrea Natale, M.D., a medical professor at Ohio State University and a specialist in the treatment of abnormal heart rhythms. Natale is a nationally-recognized electrophysiologist and cardiac expert who has personally performed over 2,000 ablations. The UCLA defendants also submitted the declaration of Douglas L. Packer, M.D., a medical professor at the Mayo School of Medicine, whose practice focuses on cardiac electrophysiology and research.

Plaintiff contends Natale's declaration is legally incompetent because it was executed outside of California, but did not reference "the laws of the State of California." (Code Civ. Proc., § 2015.5)[5] Plaintiff, however, never filed any objections

[5] Code of Civil Procedure section 2015.5 provides, in relevant part: "Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), *if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California.*" (Italics added.)

to Natale's declaration, and therefore waived the point. (See, e.g., *Rader v. Thrasher* (1972) 22 Cal.App.3d 883, 886.)

Natale concluded Nadine was an appropriate candidate for catheter ablation in August 2004, and the doctors' decision to perform the procedure met the applicable standard of care. She further opined: "The August 2004 catheter ablation was performed well within the standard of care. The medical records describe a text-book ablation. Every aspect of the procedure — including all of the power settings, temperature settings and burn times — was appropriate." Natale stated there was nothing in Nadine's medical history, or the way the procedure was performed, that made it more likely Nadine would develop the atrio-esophageal fistula that lead to her death. She explained there is no definitive way to prevent this complication, and concluded Nadine's death from the atrio-esophageal fistula did not suggest the doctors departed from the standard of care.

Similarly, Packer testified the method employed during Nadine's ablation, "the wide area circumferential or Poppone [*sic*] technique, was well within the standard of care and is one that is used by the major centers treating patients with atrial fibrillation." He further opined that "[t]he power settings, temperature settings and burn times employed during the procedure by Dr. Swerdlow were appropriate and within the standard of care." He concluded with his "professional opinion that to a reasonable medical probability [Nadine's] demise was not attributable to any negligence on the part of Dr. Swerdlow."

Plaintiff did not submit an expert witness declaration from a physician, choosing to rely instead on his own declaration. Plaintiff compared the LEPVI procedure he states was described to Nadine with the Pappone technique actually performed. He states these approaches were very different; "[t]he one Nadine consented to was a picture of simplicity while the one that was performed on her appeared to burn tissue needlessly." He also states that Cesario was "an inexperienced trainee electrophysiologist," and that the doctors "subjected Nadine to a medical research

experiment . . . ." He concludes that the UCLA defendants "fatally injured [Nadine] and wrongly deprived [her] of her life."

Plaintiff's declaration fails to raise a triable issue of fact on whether the UCLA defendants' actions negligently or wrongfully caused Nadine's death. "[W]here a professional person is accused of negligence in failing to adhere to accepted standards within his profession[,] the accepted standards must be established only by qualified expert testimony . . . ." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277.) Thus, "[w]here a medical process or procedure is not a matter of common knowledge, expert testimony is required to show that a doctor breached the standard of care of the medical community." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071.) "'The "common knowledge" exception is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson "is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised." [Citations.]' [Citation.]" (*Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 801.) Thus, no expert opinion is required when a surgeon leaves scissors in a patient's abdomen after surgery or where "'the surgeon saws off the wrong leg.'" (*Ibid.*) But expert testimony is necessary to establish that a breach in the standard of care caused the injury. (See *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402.)

Plaintiff is not a physician and is not qualified to opine on whether the UCLA defendants met the applicable standard of care in performing the cardiac ablation or whether their actions caused Nadine's death. These subjects are indisputably outside the common knowledge of lay people. Similarly, although the LEPVI technique may differ from the "the wide area circumferential" technique, the extent of the difference, if any, must be established by the testimony of a qualified physician. Both of the UCLA defendants' physician experts opined the doctors used an appropriate technique to ablate

Nadine's heart and properly performed the procedure. "The fact that a particular injury suffered by a patient as the result of an operation is something that rarely occurs does not in itself prove that the injury was probably caused by the negligence of those in charge of the operation." (*Siverson v. Weber* (1962) 57 Cal.2d 834, 839; see also *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 830-831.)

"'When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.'" (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.) Because plaintiff failed to counter the UCLA defendants' experts who declared the doctors met the applicable standard of care and their actions did not cause Nadine's demise, plaintiff failed to raise a triable issue of fact on these issues. The trial court therefore did not err in granting summary adjudication of plaintiff's wrongful death claim.

C. *The Trial Court Erred in Granting Summary Adjudication on Plaintiff's Second Cause of Action for Lack of Informed Consent*

1. Whether the UCLA Defendants Should Have Warned Nadine of the Risk of Death from the Atrio-Esophageal Fistula Complication Presents a Triable Issue of Fact

a. Adequacy of the Disclosures Given

There is no dispute the UCLA defendants failed to warn Nadine of the risk of death from the atrio-esophageal fistula complication that took her life. Rather, the issue raised is whether they were required to warn Nadine about this specific complication.

"'"[A]s an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed

therapy and of the dangers inherently and potentially involved in each." [Citation.] The scope of a physician's duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient's decision should be given. [Citation.] [¶] Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. [Citations.] To be material, a fact must also be one which is not commonly appreciated. [Citation.] If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure. [Citation.]' [Citation.] The physician's duty to disclose is twofold. "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure. [Citation.]' [Citation.] 'Second, "[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances." [Citation.]' [Citation.]" (*Wilson v. Merritt* (2006) 142 Cal.App.4th 1125, 1133-1134.)

"[T]he patient's interest in information does not extend to a lengthy polysyllabic discourse on all possible complications. A mini-course in medical science is not required; the patient is concerned with the risk of death or bodily harm, and problems of recuperation. . . . [¶] However, . . . when a given procedure inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 (*Cobbs*).)

"The scope of a physician's duty to disclose is set by law rather than by the custom of physicians." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292, fn. 3 (*Truman*).) Accordingly, the question whether a doctor has a legal duty to disclose in a particular

situation is primarily a question for the jury, not an expert, to determine. (*Wilson v. Merritt* (2006) 142 Cal.App.4th 1125, 1134 (*Wilson*).) The Supreme Court has "stressed the paramount role of the trier of fact in informed consent cases," recognizing, "for example, that questions such as whether the danger posed by a failure to disclose a particular risk is remote, whether the risk was or was not commonly known, and whether circumstances unique to a given case supported a duty of disclosure were matters for the jury to decide." (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1184.) "[T]he touchstone of the physician's duty of disclosure is the patient's need for 'adequate information to enable an intelligent choice,' a peculiarly fact-bound assessment which juries are especially well-suited to make." (*Id.* at p. 1186.)

Expert testimony, however, does have its place in informed consent cases. For example, an expert should testify on the standard of practice in situations where, beyond the minimal disclosure of the potential of death, serious harm, and other complications, the doctor must disclose "'"such additional information as a skilled practitioner of good standing would provide under similar circumstances." [Citation.]' [Citation.]" (*Wilson, supra,* 142 Cal.App.4th at p. 1134.)

To meet their burden of production on the informed consent issue, the UCLA defendants cited the forms Nadine executed the day before the procedure. Specifically, Nadine executed the following forms: "Cardiac Catheter Ablation," which disclosed the risk of cardiac perforation and included the warning, "You may die from the procedure"; "Cardiac Catheterization," which disclosed, "You may die from the procedure," and stated the probability of death as "1 in 1000"; "Transesophageal Echocardiogram," which disclosed the possibility of injury to the esophagus and adjacent tissue; and "Electrophysiology (EP) Study," which disclosed risks of cardiac perforation and heart attack.

The UCLA defendants also relied on Natale's declaration that the atrio-esophageal fistula complication is rare, stating: "Although some in the electrophysiology

community believe that the incidence of [atrio-esophageal fistula] is as high as 1 percent, only about 18 atrio-esophageal fistulas have been reported worldwide out of approximately 20,000 to 30,000 catheter ablations for atrial fibrilliation — suggesting that the risk of this complication is far less than 1 percent." Natale opined: "The standard of care required that [Nadine] be informed of the risk of death, and the medical records indicate that she was informed of and accepted this risk. That she accepted the risk of death indicates that she accepted the risk of an atrio-esophageal fistula-related death. The standard of care did not require that [Nadine] be informed of each and every way she could die. Knowing *that* death could occur, rather than knowing *how* it could occur, is the important factor for a reasonable patient to decide whether to undergo or decline a catheter ablation. The standard of care did not require the specific disclosure of the risk of atrio-esophageal fistula or death from an atrio-esophageal fistula."

In opposition, the plaintiff relies on his declaration describing the consultation he and Nadine had with Shivkumar the evening before the procedure. Plaintiff pointed out to Shivkumar that warning number 12 on the cardiac catheter ablation consent form, identifying the risk of death as a complication, was ambiguous and vague. Plaintiff states: "I asked Dr. Shivkumar if he might qualify this warning by telling Nadine and me what kinds of conditions might result in the death of a patient undergoing a catheter ablation. He replied with a list of infirmities which he believed could compromise a patient's chances of having a safe, if not successful ablation. I asked him if Nadine was at risk for any of these problems. He answered 'no.'"

We conclude Natale's opinion fails to establish as a matter of law that Nadine's doctors had no obligation to disclose the risk of the atrio-esophageal fistula complication. True, Natale noted that only 18 cases of the complication have been reported out of 20,000 to 30,000 procedures, suggesting a complication rate of less than one-tenth of one percent. But Natale also noted that "some in the electrophysiology community believe that the incidence of [atrio-esophageal fistula] is as high as

1 percent . . . ." The only consent form referencing a specific probability of death was the Cardiac Catheter form, which described the probability of death as "1 in 1000." Given at least some professionals in the electrophysiology community believe the atrio-esophageal fistula complication is as high as 1 in 100 — 10 times higher than the risk disclosed — and the specific information plaintiff requested from Shivkumar, a jury could determine Shivkumar provided inadequate disclosures. Moreover, plaintiff's specific questions regarding conditions potentially resulting in death demonstrated unique concerns expanding the scope of the required disclosure. (See *Truman, supra,* 27 Cal.3d at p. 291.) In sum, the evidence presented raised a triable issue of fact on whether the doctors should have informed Nadine of the specific risk that led to her death.

The UCLA defendants rely on *Morgenroth v. Pacific Medical Center, Inc*. (1976) 54 Cal.App.3d 521, 534, for the proposition that disclosure requirements are met when the doctor informs a patient of the risk of death. There, a patient sued his doctor after suffering a disabling stroke during a coronary anteriogram. The patient conceded the doctor had warned him of the risk of death or serious disease, but argued the doctor should have provided a specific warning as to stroke. (*Id.* at p. 530.) Affirming the trial court's nonsuit for the doctor, the court concluded, "the information that a procedure carries the risk of death or serious disease in lay language sufficiently explains the range of complications that might occur, including a stroke." (*Id.* at p. 534.) The court also determined that the question of what "'additional information as a skilled practitioner of good standing would provide under similar circumstances,'" was solely a matter for expert testimony, which the patient failed to present. (*Ibid.*)

Morgenroth is distinguishable. Here, plaintiff and Nadine, upon reading the informed consent form disclosing the risk of death, requested more detailed information on how death may occur and whether these complications posed a risk of death for Nadine. Nothing in *Morgenroth* suggests the plaintiff had requested any further clarification.

b. Causation

A physician is liable for failing to provide adequate disclosure of known risks only where there is a "causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs, supra*, 8 Cal.3d at p. 245.) "[C]ausation must be established by an *objective* test: that is, the plaintiff must show that reasonable 'prudent person[s]' in the patient's position would decline the procedure if they knew all significant perils." (*Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 657.)

In her declaration, Natale addressed the question of whether the doctors' failure to inform Nadine of the specific atrio-esophageal risk would have affected her decision to have the procedure. Based on her review of Nadine's medical records, Natale determined that Nadine suffered from chronic and symptomatic atrial fibrillation, a condition "associated with heart failure, blood clots, a five to sevenfold increase in stroke, and increased mortality from heart disease." Natale determined that Nadine's atrial fibrillation was resistant to antiarrhythmic medications, and had become progressively more frequent and intense. She concluded Nadine was an appropriate candidate for the catheter ablation procedure in August 2004, and nothing about Nadine's condition or medical history increased the risk of atrio-esophageal fistula or death.

On the specific issue of causation, Natale stated: "To a reasonable medical probability, there is no causal relationship between the alleged failure to inform of the risk of atrio-esophageal fistula and the death of [Nadine]. It cannot be stated to a reasonable medical probability that a reasonable patient with chronic and symptomatic atrial fibrillation would have declined the catheter ablation if the specific risk of atrio-esophageal fistula [had] been disclosed. In my professional opinion, a reasonable patient with [Nadine]'s condition could not have declined the catheter ablation even if this specific risk had been disclosed. This is because the risks of heart failure, stroke and

death increased significantly without a catheter ablation. Given the gravity of these risks, any reasonable person would have made the same decision as [Nadine] made — i.e., to undergo the ablation."

Natale's opinion regarding what a reasonable patient in Nadine's position would do is beyond her expertise and must be disregarded. "A medical doctor, being the expert, appreciates the risks inherent in the procedure he is prescribing, the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment. But once this information has been disclosed, that aspect of the doctor's expert function has been performed. The weighing of these risks against the individual subjective fears and hopes of the patient is not an expert skill." (*Cobbs, supra,* 8 Cal.3d at p. 243.)

That an expert is incompetent to testify regarding whether a reasonable patient would consent to a procedure, does not mean a court may never grant summary judgment on an informed consent claim. For example, where the risks of harm from a procedure are minimal, and the risks of foregoing the procedure pose a high risk of harm or death, a medical expert's testimony on those risks may establish as a matter of law that no reasonable patient would refuse consent. But this is not the present situation. True, Natale established that Nadine suffered from chronic and symptomatic atrial fibrillation that had become progressively more frequent and intense, and was resistant to medication. Natale also opined that Nadine presented no special risks of complication from the procedure, and declining treatment would leave her at an increased risk for stroke and heart attack. But Natale did not specify to what degree, if any, the increased risks for stroke or heart attack exceeded the risks from the procedure. Having provided insufficient information to allow us to determine, as a matter of law, that no reasonable patient would have refused the ablation procedure, the UCLA defendants failed to meet their burden. We therefore conclude the trial court erred in granting summary judgment for the UCLA defendants.

D. *The Trial Court Did Not Err in Sustaining Demurrers Without Leave to Amend to Plaintiff's Third Through Eighth Causes of Action*

1. Third Cause of Action

In his third cause of action for "Lack of Consent — Patient Abandonment," plaintiff alleges Nadine conditioned her surgical consent on Swerdlow and Shivkumar acting as a team during her procedure. The trial court sustained Swerdlow's demurrer to this cause of action without leave to amend because the facts did not demonstrate Swerdlow had a legal obligation to prevent Shivkumar from leaving the operating room. The court further held that the allegations did not establish Shivkumar's abandonment of Nadine. Plaintiff does not allege the doctors explained to Nadine how they would work as a team, and Shivkumar's alleged departure shortly after Nadine was placed under anesthesia does not demonstrate the two doctors did not actually work together.

We agree with the trial court. Absent allegations the doctors agreed to perform specific aspects of the procedure, Shivkumar's early departure does not by itself demonstrate patient abandonment.

2. Fourth Cause of Action

Plaintiff's fourth cause of action, "Battery — Ghost Surgery," alleges the UCLA defendants committed a battery on Nadine by having Cesario perform the ablation procedure.

"As a general rule, one who consents to a touching cannot recover in an action for battery. [Citation.] Thus, one who gives informed consent to a surgery cannot recover for resulting harm under a theory of battery. [Citations.] However, it is well recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act. [Citation.] [¶] The rule of conditional consent has been applied in battery actions against physicians and surgeons in California . . . . [Citations.]" (*Ashcraft v.*

King (1991) 228 Cal.App.3d 604, 609-610.) "'There are three elements to a claim for medical battery under a violation of conditional consent: the patient must show his consent was conditional; the doctor intentionally violated the condition while providing treatment; and the patient suffered harm as a result of the doctor's violation of the condition. [Citation.]' [Citation.]" (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1497-1498.)

Our ruling upholding summary adjudication on plaintiff's wrongful death cause of action conclusively negates the third element of his battery claim. Specifically, when a grant of summary judgment or summary adjudication demonstrates the plaintiff cannot establish an element of a related cause of action, any error by the trial court in sustaining a demurrer to the related cause of action is deemed harmless. (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 664.) In connection with their summary judgment motion, the UCLA defendants established the doctors performed the ablation procedure on Nadine in a competent and appropriate manner, and plaintiff was unable to establish a triable issue regarding this fact. Because plaintiff did not demonstrate harm arising from Cesario's participation in the operation, we do not disturb the trial court's sustaining of demurrers to plaintiff's battery cause of action without leave to amend.

3. Fifth, Seventh, and Eighth Causes of Action

Plaintiffs' fifth cause of action for battery based on covert medical experimentation alleges defendants "performed an experimental form of the ablation procedure upon NADINE, using her need for medical treatment as an opportunity to surreptitiously engage in a dangerous and purely speculative course of conduct . . . ." Similarly, plaintiff's seventh cause of action for fraud based on medical experimentation also alleged defendants "engage[d] in an unlawful, dangerous and purely speculative course of conduct . . . ." Finally, plaintiff's eighth cause of action for negligence per se

alleges the UCLA defendants violated unspecified statutes and regulations by performing "unlawful medical experimentation" on Nadine.

In support of summary adjudication on plaintiff's wrongful death cause of action, the UCLA defendants established the specific procedure performed on Nadine, including the use of and esophageal temperature probe, was not "experimental or investigational" at the time of the operation. Plaintiff provided no competent evidence rebutting this point to the trial court. Nonetheless, plaintiff requests we judicially notice a host of documents relating to medical experimentation. The documents were neither presented to the trial court nor addressed in the parties' briefs. Plaintiff acknowledges the "'eleventh hour'" nature of his judicial notice request, but argues that logistical problems and personal health issues prevented him from presenting the material sooner.

"Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, . . . 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.]" (*Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, fn. 3.) We conclude plaintiff's explanation for his failure to present the proffered evidence sooner does not justify departure from the general rule that an appellate court will consider only the evidence presented to the trial court. Accordingly, we deny plaintiff's request for judicial notice. We conclude our ruling on plaintiff's wrongful death claim renders harmless any error in the trial court's demurrer ruling on the fifth, seventh, and eighth causes of action.

4. Sixth Cause of Action

Plaintiff's sixth cause of action for fraud, entitled "ghost surgery," alleges Swerdlow and Shivkumar falsely promised Nadine they would perform the surgery as a team to induce Nadine to undergo the surgery and thereby use her body as "'on-the-job training' for understudy Dr. Cesario . . . ." Plaintiff alleges Nadine was deprived of the

skill and experience of Swerdlow and Shivkumar and suffered the atrio-esophageal complication as a result. Again, plaintiff was unable to raise a triable issue of fact in response to the UCLA defendants' evidence that Cesario performed the ablation procedure within the standard of care. Because plaintiff is unable to demonstrate causation and damages, any error in sustaining demurrers to the sixth cause of action is harmless.

III

DISPOSITION

Summary judgment in favor of Irvine Regional and the UCLA defendants is reversed. The orders granting summary adjudication in favor of the UCLA defendants on the first cause of action and sustaining without leave to amend the demurrers of Shivkumar, Cesario, and UCLA to the fourth through 10th causes of action, and the demurrers of Swerdlow to the third through 10th causes of action are affirmed. In the interests of justice, each party is to bear its own costs of this appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.